MOTION FILED
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No. 87-470

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

MOTION OF BURKE H. MENDENHALL FOR LEAVE TO INTERVENE

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MOTION FOR LEAVE TO INTERVENE

Petitioner and Amicus Curiae, Burke Mendenhall (hereinafter "Mendenhall"), respectfully requests this Court to allow him leave to intervene to challenge the validity of an Order entered by the Marion County Circuit Court, The Honorable Anthony J. Metz on August 1, 1983, and the subsequent forfeiture of the leased premises on or about August 6, 1987, pending the final determination of the constituionality of the Indiana RICO Statute by this Court. In support of said Petition, Mendenhall would show the Court:

1. Mendenhall, currently a Defendant in the matter pending in the trial court below soley by virtue of his status as a landlord, is the only remaining landlord of the original twentytwo (22) Defendants. The other two (2) landlords originally named as Defendants were dismissed on motion of the Marion County Prosecuting Attorney on December 27, 1984. Petitioner believes that his real property is the only real estate in the State of Indiana subject to a pre-judgment forfeiture under the Indiana RICO Statute at the present time.

2. On October 30, 1987, Mendenhall filed an Amicus Curiae Brief in support of a Petition for Writ of Certiorari filed in this matter. On March 7, 1988, this Court granted the Writ of Certiorari.

3. Under 28 U.S.C. §2101(f) your Petitioner is a "party aggrieved" by the Order presently under review by this Court.

4. This motion for Leave to Intervene raises important constitutional questions involving the pre-judgment taking of Mendenhall's business real estate (hereinafter referred to as the "leased premises") on August 6, 1987 without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

5. This matter was initially filed in the Marion County Circuit Court, Indianapolis, Indiana, by the Marion County Prosecuting Attorney, Stephen Goldsmith, who alleged, among other things, that Mendenhall, owned the real estate at 4266 West 38th Street, Indianapolis, Indiana, the "leased premises", where an adult bookstore was engaged in racketeering activities as defined in the Indiana Racketeering Influence and Corrupt Organizations Act ("RICO"), Indiana Code 35-45-6-1, et seq.

6. On August 1, 1983, the Marion County Circuit Court, The Honorable Anthony J. Metz, Judge, in Cause No. C83-1788, issued its Findings of Fact and an Order declaring that the business property owned by Mendenhall, at 4266 West 38th Street, Indianapolis, Indiana, was subject to forfeiture under the remedies section provided in the Civil Remedies for Racketeering Activities ("CRRA"), Indiana Code 34-4-30.5-1, et seq. (hereinafter referred to as the "Forfeiture Order").

7. Following a change of venue from Marion County, the Hamilton County, Indiana Circuit Court entered an

Order on November 21, 1983, overruling a Motion of a co-defendant, Burton Gorelick, to vacate the Forfeiture Order, which ruling was then appealed to the Indiana Court of Appeals, Fourth District, as an Interlocutory Appeal in Consolidated Cause No. 4-1284 A 415.

8. On February 2, 1984, Chief Judge Paul H. Buchanan, Jr., Court of Appeals of Indiana, entered an Order upon Interlocutory Appeal modifying the Forfeiture Order of the Marion County Circuit Court dated August 1, 1983, pending the appeal of that matter to the Indiana Court of Appeals, which allowed the leased premises to be reopened.

9. The Indiana Court of Appeals for the Fourth District in 4447-Corp. v. Goldsmith, (1985), Ind. App.) N.E.2d 578, 592 held that the Civil RICO and CRRA statutes at issue constituted facially unconstitutional prior restraints in their application to the predicate offense of obscenity.

10. On March 2, 1987, the Indiana Supreme Court granted a Petition for Transfer, vacated the Opinion of the Indiana Court of Appeals, and remanded the matter to the Hamilton County Circuit Court for further proceedings not inconsistent with that Opinion. See 4447 vs. Goldsmith 504 NE 2nd 559 (Ind 1987)

11. Subsequent to the decision of the Supreme Court of Indiana, the Honorable James E. Noland, Judge, United States District Court for the Southern District of Indiana, in an unrelated criminal matter on June 5, 1987, under Cause Number IP86-20-CR-Ol entered an Amended Judgment and Order of Forfeiture in the case captioned United States of America v. Burton Gorelock directing Gorelick to vacate the leased premises at 4266 West 38th Street, Indianapolis, Indiana, and cease business operations at the Plaza Entertainment Center on or before March 2, 1987. A copy of that Order follows as appendix "A."

12. From on or about March 2, 1987, to and including August 3, 1987, the leased premises remained vacant at 4266 West 38th Street, Indianapolis, Indiana.

13. On or about August 3, 1987, a new business entity, unrelated to Burton Gorelock, described in paragraph 11 above, began business at the leased premises at 4266 West 38th Street, Indianapolis, Indiana.

14. On or about August 6, 1987, members of the Indianapolis Police Department, under the direction of the Marion County Prosecuting Attorney's Office, and not under the authority of any new Court Order, padlocked the leased premises under the authority of the August 1, 1983, Forfeiture Order of the Marion County Circuit Court in this matter.

15. On August 13, 1987, a representative of the Marion County Prosecuting Attorney's Office, Indianapolis, Indiana, advised Mendenhall's counsel that the new business located at the leased premises, was closed under the authority of the August 1, 1983, Order.

16. On August 19, 1987, a Petition for Stay of Execution of Forfeiture of the premises was filed with the Indiana Supreme Court. Although Mendenhall was not a party to the appeal to the Indiana Appellate Courts, he had standing as a Defendant in the trial court to seek a stay from the Indiana Supreme Court.

17. On September 2, 1987, the Indiana Supreme Court denied Mendenhall's request for a stay on the grounds that it lacked jurisdiction.

18. On March 29, 1988, Mendenhall filed an Emergency Petition for Stay of Execution of Judgment pending a decision by this Court with the Hamilton County Circuit Court.

19. An evidentiary hearing was held in the Hamilton County Circuit Court on May 24, 1988.

20. On May 27, 1988, the Hamilton County Circuit Court denied Mendenhall's Emergency Petition for a Stay.

21. On June 3, 1988, Mendenhall filed a second Petition for Stay of Execution of Judgment with the Indiana Supreme Court.

22. On June 17, 1988, the Indiana Supreme Court denied the Petition for Stay for no specified reason.

23. Mendenhall is in default on the mortgage payment for the leased premises which forced him to seek protection from the United States Bankruptcy Court for the Southern District of Indiana under Cause Number IP88-4174RAB on August 29, 1988.

24. Mendenhall continues to be irreparably injured and will continue to be denied the right to collect rents from any business tenant at the leased premises without the benefit of any judicial determination and/or order, and will be irreparably injured during the pendency of the case before this Court.

WHEREFORE, Petitioner Burke H. Mendenhall, Amicus Curiae herein, prays that he be granted leave to intervene in this matter before the Supreme Court of the United States.

Dated 9/30/88

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